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SUTTER, ROCHE & GENTRY 1928
GENTRY & GENTRY 1949
GENTRY, McNULTY & KIMBLE 1955
GENTRY, McNULTY, TOCI & BOROWIEC 1969
GENTRY, McNULTY & DESENS 1979
DESENS & HITCHCOCK 1986
HITCHCOCK, HICKS & CONLOGUE 1992

August 7, 2001

VIA CERTIFIED MAIL

Docket Control
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

RE: Docket No. E-03869A-00-0268
PDM ENERGY L.L.C. / CC&N

AZ CORP COMMISSION
DOCUMENT CONTROL

2001 AUG 13 P 12:53

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Dear Sir/Madam:

I have enclosed the original and ten copies of Sulphur Springs Valley Electric Cooperative, Inc.'s Application for Rehearing regarding the above matter. I have also included an additional copy to be file stamped for our files. Please forward that to me in the stamped, self-addressed envelope I have provided.

Please do not hesitate to contact me if you have any questions.

Arizona Corporation Commission

DOCKETED

AUG 13 2001

DOCKETED BY	<i>mc</i>
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Sincerely,

HITCHCOCK & HICKS

By

[Signature]
Christopher Hitchcock

/lmr
Enclosure

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6 CHRISTOPHER HITCHCOCK

STATE BAR NO. 004523

7 **BEFORE THE ARIZONA CORPORATION COMMISSION**

8 WILLIAM A. MUNDELL

Commissioner - Chairman

9 JAMES M. IRVIN

Commissioner

10 MARC SPITZER

Commissioner

12 IN THE MATTER OF PDM ENERGY, L.L.C.)
13 FOR A CERTIFICATE OF CONVENIENCE)
14 AND NECESSITY TO PROVIDE COMPETITIVE)
15 RETAIL ELECTRIC SERVICES AS AN)
ELECTRIC SERVICE PROVIDER PURSUANT)
TO A.A.C. R14-2-1601 *ET SEQ.*)

DOCKET NO.:
E-03869A-00-0268

APPLICATION FOR
REHEARING AND
REQUEST FOR STAY OF
DECISION NO. 63869

16 Sulphur Springs Valley Electric cooperative, Inc. ("SSVEC"), a party in the above
17 proceedings, pursuant to A.R.S. §40-253, submits to the Commission this Application For Rehearing
18 and Request for Stay of Decision No. 63869 entered and dated July 25, 2001 ("Decision"), and of
19 the whole thereof, on the grounds that the Decision is unlawful, unreasonable, unjust,
20 unconstitutional, in excess of the Commission's jurisdiction, arbitrary, capricious and an abuse of the
21 Commission's discretion for the following reasons and upon the following grounds:

- 22 1. The Decision is not supported by substantial evidence.
- 23 2. The Decision is unconstitutional by granting the Application of PDM ENERGY, L.L.
- 24 C. ("PDM") for a Certificate of Convenience and Necessity ("CC&N") as an Electric Service
- 25 Provider ("ESP") as defined in A.A.C. R14-2-1601, et seq., as amended, the Retail Electric
- 26 Competition Rules ("Rules"), and by issuing to PDM a CC&N to supply Competitive Services, as
defined in the Rules on a statewide basis, which statewide basis includes all of the areas described in

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1 the CC&Ns issued by the Commission to SSVEC as an electric public service corporation ("PSC")
2 for each and all of the following reasons:

3 A. The Decision violates Article XV, Sections 3 and 14 of the Arizona
4 Constitution by authorizing PDM to charge rates which are not based on the fair value of the property
5 of PSCs devoted to the public use, nor on a just and reasonable rate of return on such fair value nor
6 on a rate design which will produce just and reasonable rates based thereon.

7 B. The Decision violates Article XV, Section 3 of the Arizona Constitution by
8 delegating to PDM the authority to determine the rates PDM will charge customers and by permitting
9 PDM to charge what are ostensibly "market-determined rates". The Commission has the duty to
10 prescribe the rates PDM is authorized to charge and this duty cannot be delegated to PDM, the
11 market or anyone else.

12 C. The Decision violates Article XV, Section 3 of the Arizona Constitution by
13 authorizing PDM to prescribe classes to be used by PDM. The Commission is to prescribe
14 classifications to be used by PDM and this duty cannot be delegated to CSCES or anyone else.

15 D. The Decision violates Article XV, Sections 3 and 12 of the Arizona
16 Constitution by authorizing PDM to discriminate in charges made to customers within the classes of
17 customers of PDM that are or must be prescribed by the Commission. Section 12 requires that there
18 shall be no discrimination in charges made between persons or places for rendering a like or
19 contemporaneous service.

20 E. The Decision violates Article XV, Sections 2 and 3 of the Arizona Constitution
21 which requires that all corporations or entities other than municipal furnishing electricity for light, fuel
22 or power shall be deemed PSCs by creating a new type of certificate of convenience and necessity
23 ("CC&N) for ESPs, including PDM, who have not been issued CC&Ns by the Commission pursuant
24 to A.R.S. §§40-281, *et seq.*, as have SSVEC and the other Affected Utilities. Only one type of
25 CC&N is permitted by said Sections and the only power or jurisdiction granted by such Section 3 of
26 the Arizona Constitution to the Commission with respect to classes of PSCs is to prescribe just and

1 reasonable classifications to be used by PSCs and not the power and jurisdiction to prescribe just and
2 reasonable classes of PSCs.

3 F. The Decision unlawfully permits PDM to charge interim rates.

4 3. The Decision violates Article IV and Article XV, Section 6 of the Arizona
5 Constitution by purporting to give the Commission the right to exercise legislative powers expressly
6 or impliedly reserved to the Legislature by the Arizona Constitution.

7 4. The Decision is unconstitutional in violation of the just compensation provisions of
8 the Fifth Amendment as incorporated into the Due Process Clause of the Fourteenth Amendment of
9 the United States Constitution and Article II, Section 4 of the United States Constitution and Article
10 II, Section 17 of the Arizona Constitution by breaching the contract and the exclusive regulatory
11 compact between the State of Arizona and SSVEC.

12 5. The Decision breaches the contract and regulatory compact between the State of
13 Arizona and SSVEC by denying SSVEC the exclusive right to sell electricity and serve its customers
14 in its certificated areas and is unconstitutional in violation of Article II, Section 17, Article III and
15 Article VI, Section 1 of the Arizona Constitution which require that when vested property rights are
16 taken or damaged for public or private use, the State must, before such taking or damage, pay on
17 behalf of the owner of the property or property rights taken or damaged just compensation (i) into
18 court, secured by a bond as may be fixed by the court or (ii) into the State treasury on such terms and
19 conditions as are provided by statute.

20 6. The Decision is unconstitutional, in excess of the jurisdiction of the Commission and
21 in violation of Article II, Section 17, Article III and Article VI, Section 1 of the Arizona Constitution
22 that:

23 A. The issue of just compensation to be paid SSVEC for the breach of the
24 contract and the regulatory compact with the State or Arizona is an issue to be determined by the
25 courts, not the Commission, and the Decision fails to provide for just compensation by the courts.

26 B. The Decision places unconstitutional restrictions, burdens and limitations on

1 the right of SSVEC to obtain just compensation for the breach of the contract and the regulatory
2 compact with the State of Arizona and the loss of, and damage to its vested property rights.

3 7. The Decision is unconstitutional and in violation of Article I, Section 10, Clause 1 of
4 the United States Constitution and Article II, Section 25 of the Arizona Constitution in that it impairs
5 the obligation of contracts:

6 A. Between the State of Arizona and SSVEC, which has been issued certificates
7 of convenience and necessity by the Commission pursuant to A.R.S. §§40-281, *et seq.*, which are in
8 full force and effect, and

9 B. Between SSVEC and its members as they have agreed to purchase all of their
10 electricity from and have their related services performed by SSVEC.

11 8. The Decision is unconstitutional, exceeds the jurisdiction of the Commission and
12 violates the just compensation provisions of the United States and Arizona constitutions by
13 confiscating the property of SSVEC.

14 9. The Decision violates the Supremacy Clause of Article VI of the United States
15 Constitution, Article II, Section 3 of the Arizona Constitution, and the Rural Electrification Act of
16 1936, as amended, United States Code Annotated, Title 7, Chapter 31, Subchapters I and III ("RE
17 Act") by reason of:

18 A. Loans made by the United States pursuant to the RE Act to AEPCO and to
19 SSVEC which are secured by utility realty mortgages and security agreements based upon the all-
20 requirements wholesale power contract between AEPCO and SSVEC are placed in jeopardy by the
21 Decision.

22 B. By permitting the benefits of the RE Act to be enjoyed by those not intended
23 to be beneficiaries of the Act, such as ESPs who are permitted to use or access the distribution
24 facilities of SSVEC without its consent, to the detriment of the Act's true beneficiaries are those
25 financing the RE Act's programs.

26 10. The Decision violates the Due Process Clauses of each of the Fourteenth Amendment

1 of the United States Constitution and Article II, Section 4 of the Arizona Constitution for each of the
2 following reasons:

3 A. The Decision unlawfully amends and/or deprives SSVEC of the benefits of
4 prior decisions of the Commission in its certification, finance, ratemaking and other orders without
5 notice and an opportunity to be heard as required by A.R.S. §40-252.

6 B. The Decision is contrary to accepted judicial construction of A.R.S. §40-252,
7 as set forth in decisions of the Arizona Supreme Court, as the Decision permits competitive
8 encroachment into SSVEC's territory without the showing of inability or unwillingness of SSVEC
9 to serve required by law.

10 C. The Decision places an irrational condition on the amendment of SSVEC's
11 CC&N by conditioning the amendment upon final resolution of stranded cost issues for SSVEC,
12 which cannot be determined until the actual start and operation of competition within it's certificated
13 area.

14 11. The Decision unlawfully restricts SSVEC from providing Competitive Services, as
15 defined in the Rules, pursuant to, or based upon, the existing CC&Ns of SSVEC.

16 12. The Decision is unconstitutional in that it prohibits SSVEC, who has been issued
17 CC&Ns pursuant to A.R.S. §§40-281, *et seq.*, from selling electricity and other services competitively
18 outside its certificated areas when PDM, who has not been issued CC&Ns pursuant to A.R.S. §§40-
19 281, *et seq.*, is granted the right to sell metering services competitively anywhere in the State of
20 Arizona, except in the service territories of municipal corporations or political subdivisions of the
21 State of Arizona who do not elect Reciprocity pursuant to A.A.C. R14-2-1611.

22 13. The Decision violates the Equal Protection Clauses of the Fourteenth Amendment of
23 the United States Constitution and Article II, Section 13 of the Arizona Constitution by burdening
24 SSVEC with unlawful discriminatory restrictions and requirements which are not made applicable to
25 PDM although both SSVEC and PDM are PSCs such as:

26 A. SSVEC is required to comply with A.R.S. §40-281, 40-282 and other

1 regulatory statutes, whereas PDM is not;

2 B. SSVEC is required to serve electricity and provide meter services within its
3 certificated areas whereas PDM is not;

4 C. SSVEC is required to be a Provider of Last Resort whereas PDM is not.

5 14. The Decision deprives SSVEC of the value of its respective CC&Ns which are
6 severely damaged or taken by the Decision.

7 15. The Decision is unlawful, unconstitutional and exceeds the jurisdiction of the
8 Commission in ordering use or access of facilities of SSVEC by PDM without the consent of SSVEC.

9 16. The Decision is unlawful and exceeds the jurisdiction of the Commission by
10 impermissibly interfering with the internal management and operations of SSVEC.

11 17. The Decision is unlawful and exceeds the jurisdiction of the Commission by violating
12 the provision of ARS. §40-334, which prohibits discrimination between persons, localities or classes
13 of service as to rates, charges, service or facilities.

14 18. The public policy of the State of Arizona with respect to rates, charges and
15 classifications to be used by PSCs is established by the applicable provisions of Article XV of the
16 Arizona Constitution and neither the Commission nor the Legislature has the jurisdiction to change
17 such public policy.

18 WHEREFORE, having fully stated its Application for Rehearing and Request for Stay,
19 SSVEC respectfully requests that the Commission enter its Order granting this Application for
20 Rehearing and this Request for Staying the Decision, and the whole thereof.

21 RESPECTFULLY SUBMITTED this 8TH day of August, 2001.

22 HITCHCOCK & HICKS

23
24 BY 

25 CHRISTOPHER HITCHCOCK
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